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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1416

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER

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March 19, 1971

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER

Pursuant to Rule 24(5) of this Court, petitioner submits this Supplemental Memorandum to invite this Court's attention to a decision of the National Labor Relations Board reported after the Petition was filed, which bears directly on the Question Presented. The decision is *Association of Packers & Drivers Union (Guy's Foods, Inc.),* 188 NLRB No. 85, 76 LRRM 1380. We reprint the Board's decision as an Appen-

dix to this memorandum, and shall here discuss briefly its holding and relation to the present Petition.[1]

In *Guy's Foods* the NLRB decided that a union had restrained and coerced an employee in violation of § 8(b)(1)(A) of the Labor-Management Relations Act of 1947 by advising her that it will process her grievance through the contract machinery only if she withdraws an unfair labor practice charge filed with the Board regarding the same employer action. In the Board's view:

> "* * * Respondent Union's insistence that [the employee] give up her statutory right of access to the Board or lose her contractual right to invoke a grievance procedure made on her behalf was clearly coercive within the meaning of the Supreme Court's decision in NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO [*Marine Workers*], 391 U.S. 418." (p. 2a, *infra*)

The Board relied heavily on this Court's language in *Marine Workers:*

> "* * * that the overriding public interests (sic) makes unimpeded access to the Board the only healthy alternative * * *." (*Ibid.*)

Finally, the Board held that the responsibility of the Union to protect its members' interests, its duty of fair representation and its "legitimate discretion" to process grievances are not,

> "* * * justification to impede, deter, or interfere with an employee's right to come to this Board with an unfair labor practice charge." (*Ibid.*)

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[1] The opinion referred to herein as that of the Board is that of Members Fanning and Jenkins. Member Brown wrote a separate concurring opinion. Chairman Miller dissented. Member Kennedy did not participate.

We submit that the Board's reasoning in *Guy's Foods* parallels that in Part II of our Petition, wherein we urge that Section 10(a) of the Act forbids enforcement of an agreement which compels a union to arbitrate a matter with respect to which it has filed an unfair labor charge. We there argue:

> "The guarantee renders unenforceable any law or private agreement which imposes a 'financial burden,' or in any way conditions or qualifies the right of an aggrieved party to 'unimpeded access' to the Board. *Nash* v. *Florida Industrial Comm'n,* 389 U.S. 235, 238-239; *NLRB* v. *Marine Workers,* 391 U.S. 418, 424." (Pet. p. 17)

The Board has now shown that it reads *Marine Workers* the same way. Moreover, the Board's reading of *"any coercion"* (Board's emphasis) establishes *a fortiori* that compelling the charging party to arbitrate is also illegal. The grievant in *Guy's Foods* was deprived only of a second bite at the apple which, while perhaps increasing the probability of recovery, could not result in a duplicate recovery. (See Pet. p. 16, n. 9). On the other hand, enforcement of the arbitration agreement here not only creates for the Union a risk that the Board may defer to the arbitrator, rather than provide a *de novo* determination in the grievant's preferred forum (the company's precise objective here), but inevitably places on the Union an additional unwarranted burden—the cost of the arbitration. (See Pet. pp. 17-18).

With respect to countervailing considerations, the respondent in *Guy's Foods* was in a stronger position than the Company here. For the union there asserted, and the dissenting Chairman of the Board agreed, that its refusal to process the grievance was the exercise of "legitimate discretion" in fulfilling its statutory obligation as bargaining representative. In this case, on the

other hand, the court below held that it was sufficient justification to compel arbitration that the Company had (in the court's view) obtained that right by agreement. Not only is a voluntary agreement not on the same legal level as a statutory right or duty, but by the terms of Section 10(a) such an agreement cannot be allowed to impinge upon freedom of access to the Board. Indeed, the precise holding of *Marine Workers* was that a union constitutional provision which required exhaustion of union remedies prior to filing a Labor Board charge was unenforceable because it was contrary to public policy. 391 U.S., at 424. The agreement to arbitrate herein can fare no better under Section 10(a).

One final point is notable about *Guy's Foods*. It reinforces our position that the alternative forums recognized by *Smith* v. *Evening News* are for the benefit of the aggrieved party, who "has the right to choose the forum or forums in which he wishes to assert his interests." (Pet. p. 12). If, as the Board held in *Guy's Foods,* the aggrieved party must be allowed his *choice* to use *both* forums, despite the public policy against duplicative litigation, and in favor of responsible exercise by unions of their obligations as bargaining representatives, petitioner cannot be denied the right, which offends neither policy, to choose to proceed exclusively before the Board.

Respectfully submitted,

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APPENDIX

APPENDIX

188 NLRB No. 85 D—4485
Kansas City, Mo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 17—CB—725

ASSOCIATION OF PACKERS & DRIVERS UNION
(GUY'S FOODS, INC.)

and

MICHAEL A. GORDON, an Attorney for HELEN MEALY,
an Individual

Decision and Order

On June 29, 1970, Trial Examiner Morton D. Friedman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended that these allegations of the complaint be dismissed. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision together with supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified below.

We agree with the Trial Examiner that Respondent Union violated Section 8(b)(1)(A) by telling employee Helen Mealy on two separate occasions that her grievance against the Employer would not be processed unless Mealy

withdrew unfair labor practice charges then pending before the Board.

Contrary to our dissenting colleague, we believe that Respondent Union's insistence that Mealy give up her statutory right of access to the Board or lose her contractual right to invoke a grievance procedure made on her behalf was clearly coercive within the meaning of the Supreme Court's decision in *N.L.R.B.* v. *Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO,* 391 U.S. 418. There, as noted in the dissenting opinion, the Court held that freedom of access to the Board should be "as great" as the freedom to petition any other department of Government. The Court held that *"any coercion"* (emphasis supplied) to defeat that access was beyond the legitimate interests of a labor organization. We take this language to mean what it says. Respondent Union was not privileged, however motivated and whether or not its judgment was "reasonable" or otherwise, to force Mealy to the difficult choice of giving up her grievance or her charge before the Board. We believe the Court made it clear in the above case, as quoted by our dissenting colleague, "that the overriding public interests makes unimpeded access to the Board the only healthy alternative. . . ." No responsibility of a union to protect its members' interests, no duty of fair representation, no "legitimate discretion" to process or not to process a grievance is justification to impede, deter, or interfere with an employee's right to come to this Board with an unfair labor practice charge. We cannot interpret the Supreme Court's decision, cited above, in any other way. In our opinion, the scope of discretion which our dissenting colleague finds inherent in the Union's representative capacity is so broad as to constitute a reversal of what the Court has held to be the proper interpretation of this statute. Nor can we agree that *Spielberg Manufacturing Company,* 112 NLRB 1080, is authority for dismissing this complaint. While

it is true that the Board in *Spielberg* "recognized" an arbitration award without passing itself upon the issue of alleged strike misconduct, in that case the matter had been fully litigated before a neutral tribunal and the Board could fairly say: "In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Spielberg, supra* at 1082. No such parallel litigation has occurred here and *Spielberg* is therefore inapposite.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that the Respondent, Association of Packers & Drivers Union, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order, as modified hereinafter:

1. Change paragraph 1(a) of the Trial Examiner's Recommended Order to read: "Restraining or coercing Helen Mealy, or any employee similarly situated, in the use of the processes of the National Labor Relations Board by informing her or any other employee that we will not process a grievance unless the employee withdraws charges the employee has filed with the Board."

2. In footnote 11 of the Trial Examiner's Decision change "10" to "20" days.

Dated, Washington, D.C.

.....
John H. Fanning, Member

.....
Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER BROWN, concurring:

Respondent Union was ready and willing to take up a grievance respecting Mrs. Mealy's discharge through its contractual grievance-arbitration procedure with the Employer, but not if the very same matter was to be litigated in a concurrent unfair labor practice proceeding before the Board on Mrs. Mealy's charge against the Employer.

Even apart from time and money considerations, I readily appreciate that cogent reasons of sound labor relations may underlie a position against duplicative concurrent proceedings. However, the question presented is not whether national labor policy should impel the Board to defer to the parties' grievance-arbitration arrangements,[1] and thus not process an unfair labor practice charge in the face of such applicable arrangements. Involved here, rather, is whether, notwithstanding its good faith in the premises, Respondent Union could lawfully advise Mrs. Mealy that it would not prosecute her grievance unless she withdrew the charge.[2] With somewhat less certainty than I would desire, I agree with my colleagues that the *Marine Workers* and *Skura* cases are controlling.

Dated, Washington, D.C.

.....

Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

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[1] See, for example, my separate opinions in *Raytheon Company*, 140 NLRB 883, 888-891; *Thor Power Tool Co.*, 148 NLRB 1379, 1381-83; *The Hilton-Davis Chemical Company, Division of Sterling Drug, Inc.*, 185 NLRB No. 58, and cases cited therein (fn. 5).

[2] The Regional Director eventually dismissed the charge after investigation and did not issue a complaint.

CHAIRMAN MILLER, dissenting:

This case raises the question whether an employee representative violates Section 8(b)(1)(A) by either requesting or insisting (the facts present either possibility) that a discharged employee withdraw an individual 8(a)(3) charge as a precondition to the union's processing of the dischargee's grievance. It is my view that where, as in this case, the union acts for nondiscriminatory reasons it may require a represented employee to exhaust the contract grievance procedure prior to invocation of Board jurisdiction and decline to process a grievance if the grievant individually perseveres in an alternative forum.

The Trial Examiner and my colleagues are of the view that the *Skura*[3] and *Marine Workers*[4] decisions are precedent for a contrary view. I do not agree. Those cases involved action or threatened action by a union to penalize members for resorting to our processes, and the question presented was whether the union could compel its members to exhaust internal remedies and appeals within the union structure before complaining of such a penalty before this Board. The Supreme Court in the *Marine Workers* case said, as to that issue, *supra* at 424:

> A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. Any coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization. That was the philosophy of the Board in the *Skura* case.

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[3] *Local 138, International Union of Operating Engineers, AFL-CIO (Charles S. Skura)*, 148 NLRB 679.

[4] *N.L.R.B.* v. *Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418 (1968).

Local 138, International Union of Operating Engineers, 148 NLRB 679; and we agree that the overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved.

The issue here, however, does not involve any act of union coercion, as I interpret the facts, but only a reasonable exercise of legitimate discretion in the complex and difficult area of employee representation. A union has a duty fairly to represent its constituents. *A fortiori,* it must have a wide range of discretion in choosing the means and manner of best effectuating that representation.[5] In exercising that discretion it must take into account many considerations. It may choose not to process one employee's grievance because the facts of his case are weak and an adverse result in his case holds the potential of creating a precedent adverse to employees who, in the future, may have cases presenting the same issue upon a more solid or appealing factual basis. It may choose not to press a given grievance or group of grievances in the belief that they can be more successfully resolved across the bargaining table in an approaching contract negotiation. It may choose not to pursue a member's alleged, but doubtful, claim of contract violation because a successful prosecution of his claim may prejudice a substantial group of members who have vested interests in a contrary interpretation of the same contractual provision. It may choose to employ counsel to try some arbitration cases, but not others.

In short, a responsible union must necessarily be free to make certain judgments about how best to protect its members' interests. Reasonable discretion in the exercise of that judgment must therefore necessarily be permitted, although I do not doubt the propriety of our in-

[5] *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953).

sisting that such judgments not be made upon premises running contrary to the basic guarantees of our Act. Clearly a union may not choose, for example, to process only the grievances of its ardent supporters and refuse to process the grievances of those who choose not to engage actively in union affairs.

But here, while it was originally alleged that the refusal to process the grievance was due to the Charging Party's activity on behalf of a rival union, the Examiner specifically found that this allegation was not proved, and in fact found the record "barren of any evidence" to this effect.

Instead, it appears that the Union sought to improve upon its chances of successfully resolving the grievance through the normal grievance procedures by not antagonizing the Employer by subjecting it to dual litigation of the same issue. Indeed, the Union had been told by the Employer's counsel that "the Employer probably would not sit down to arbitrate the matter as long as the charge was pending."

Faced with this set of facts, the Union was called upon to exercise the type of discretion to which I have alluded above. It could have dropped the grievance and offered legal assistance in prosecuting the charge before this Agency. It could have sued to force the Employer to arbitrate the grievance, while at the same time encouraging the employee to pursue the unfair labor practice charge. Or, as it did here, it could choose to offer its assistance to the grievant in the contractual grievance machinery if the grievant was willing to forego the second forum of Board procedures. This it apparently believed to offer the best opportunity for favorable consideration of the complaint by the Employer, and this was the alternative it chose. I cannot agree with my colleagues that the Union, by selecting this alternative, violated our Act.

There is a further reason I would find no violation of the Act in Respondent's refusal to process Mealy's grievance during the pendency of her unfair labor practice charge based on the same events. My colleagues, by analogizing this case to *Skura* and *Marine Workers,* imply that here, as in those cases, Respondent's actions contravened the public policy of free access to the Board. They overlook the fact that the Board itself has repeatedly held that the Act does not mandate the finding of unfair labor practices when the charging party or his representative has chosen the forum of grievance and arbitration. Thus, in *Spielberg Manufacturing Company,*[6] the Board, for policy reasons, declined to exercise its normal adjudicatory and remedial powers where a fair and regular arbitration proceeding had been held. *Spielberg* has been followed in many subsequent cases. Had Respondent pursued Mealy's case through the grievance and arbitration procedure here, the Board; following its own established precedent, would have stayed its hand in the collateral 8(a)(3) proceeding. Yet the majority holds that Respondent offended public policy by offering Mealy the same choice of forums the Board itself routinely offers litigants.

I would dismiss the complaint.

Dated, Washington, D.C.

.....

Edward B. Miller, Chairman

NATIONAL LABOR RELATIONS BOARD

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[6] 112 NLRB 1080.

APPENDIX

NOTICE

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

To all Members of Association of Packers & Drivers Union

WE WILL NOT deny Helen Mealy, or any employee similarly situated, fair representation in the processing and handling of her grievance filed pursuant to the terms of our agreement with Guy's Foods, Inc., by informing Helen Mealy, or any other employee, that we will not process any grievance unless charges against Guy's Foods, Inc., are withdrawn.

WE WILL NOT restrain or coerce Helen Mealy, or any employee similarly situated, in the use of the processes of the National Labor Relations Board by informing her or any other employee that we will not process a grievance unless the employee withdraws charges the employee has filed with the Board.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

ASSOCIATION OF PACKERS
& DRIVERS UNION
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, Telephone 816—374-5181.

TXD-390-70
Kansas City, Mo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 17-CB-725

ASSOCIATION OF PACKERS & DRIVERS UNION
(Guy's Foods, Inc.)

and

MICHAEL A. GORDON, an attorney for Helen Mealy, an individual

Ward Summerville, Esq., of Kansas City, Mo., for the General Counsel.

Don M. Jackson, Esq. and *George E. Kempke, Esq.*, of Kansas City, Mo., for the Respondent.

Michael D. Gordon, Esq. (*Jolley, Walsh & Gordon*), of Kansas City, Mo., for the Charging Party.

Trial Examiner's Decision

STATEMENT OF THE CASE

MORTON D. FRIEDMAN, Trial Examiner: Upon a charge filed by Michael D. Gordon, an attorney for Helen Mealy, an individual, herein referred to as Mealy, on October 29, 1969, the Regional Director for Region 17 of the Na-

tional Labor Relations Board, herein called the Board, issued a complaint on March 11, 1970, on behalf of the General Counsel of the Board against Association of Packers & Drivers Union, herein called the Union or the Respondent, alleging violations of Section 8(b)(1)(A) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act.

In its duly filed answer to the aforementioned complaint, the Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practices.

Pursuant to notice, a hearing on this case was held before me at Kansas City, Missouri, on April 23, 1970. All parties were represented and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and file briefs. Briefs were filed by counsel for the General Counsel and the Respondent.[1] Upon consideration of the entire record, including the briefs of the parties, and upon my observation of each of the witnesses as they appeared before me I make the following:

Findings of Fact

I. The Business of the Employer

Guy's Foods, Inc., is engaged in the processing and wholesale distribution of food products. In the course and conduct of its business, Guy's Foods, herein referred to as the Employer, annually ships from its principal place of business in Kansas City, Missouri, directly to distribution facilities outside the State of Missouri goods and products of a value in excess of $50,000. It is

[1] Simultaneously with the filing of his brief, counsel for the General Counsel moved to correct the transcript of the testimony of the hearing in certain particulars. There being no opposition, this motion is granted.

stipulated and I find that the Employer is an employer engaged in interstate commerce within the meaning of Sections 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is stipulated, and I find, that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Issues*

1. Whether the Respondent refused to process a grievance on behalf of Mealy unless Mealy withdrew an unfair labor practice charge she had filed against the Employer.

2. If the answer to issue 1. is in the affirmative, did such refusal on the part of the Respondent constitute restraint and coercion in violation of Section 8(b)(1)(A) of the Act?

3. If the answer to issue 1. is in the affirmative, whether the Respondent's refusal to process the grievance was motivated by reason of Mealy's activities on behalf of a rival labor organization?

B. *The Facts*

It is undisputed that Helen Mealy began working for the employer on August 8, 1962. During her employment Mealy was active in various union affairs. During 1968 she was a member of the Respondent's negotiating committee. For sometime Mealy was also a shop steward for the Respondent and was such during 1 year immediately preceding her discharge which occurred on June 9, 1969. Some years prior to her discharge, Mealy had acted as an observer at the polls in an election in which the Respondent was opposed by the American Bakery and Confectionery Union, herein referred to as ABC. However,

although Mealy acted as the observer for the ABC at that time, she later participated as shop steward and negotiating committee member for the Respondent. She testified that she never expressed to anyone during her period of activity on behalf of the Respondent that she favored the ABC.

Mealy operated a machine which packed nuts and candies. On June 20, 1969, Mealy was discharged. Immediately upon her discharge Mealy took a bus to the Regional Office of the Board where she filed an unfair labor practice charge against the Employer.[2]

Thereafter, on June 23, according to Mealy, she went to the offices of ABC where she had one of the business agents of that organization write out a grievance for her. Then, from the offices of ABC, Mealy called William R. Dummitt, the business representative of the Respondent Union.[3] On the telephone, Mealy told Dummitt that she had been fired and wanted to file a grievance against the Employer. Dummitt said that he would be at her home that afternoon. It is undisputed that Dummitt did come to her home the afternoon of the telephone call. Mealy first gave Dummitt a copy of the charge she had filed against the Employer and then gave him the grievance which had previously been written out for her by the ABC representative. She asked Dummitt to process the grievance. Mealy's version of Dummitt's answer differs markedly from the version given by Dummitt in

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[2] The lawfulness of that discharge is not involved in this case. It appears that Mealy filed two unfair labor practice charges against the Employer both of which were dismissed upon investigation by the Regional Director.

[3] Dummitt testified, contrary to Mealy, that he received the call from Mealy on June 25 and not on June 23. He also testified that he first received the call from a man whom he could not identify and that then Mealy got on the telephone. As hereinafter discussed, I find that this difference in dates is inconsequential.

his testimony. According to Mealy, Dummitt answered her request that he process the grievance by stating, in Mealy's words "that he could not process the grievance because Guy's wanted me to drop the labor charges."

According to Dummitt, he told Mealy that he did not know what to do about the grievance, that he would have to check with Respondent's counsel about the charge. According to Dummitt he told Mealy this and explained to her that this was so because he had never run up against this before, that is, "a Board charge pending and a grievance on the same proceeding." Although on cross-examination Mealy admitted that Dummitt said something about having to see Union counsel, she insisted that Dummitt told her that he could not process the grievance unless she dropped the charge against the Employer. On the other hand, Dummitt admitted that in his pretrial affidavit he made the statement, "I told her I would have to check it and as long as she had the Labor Board charges we could not intervene."

On the basis of all of this conflicting testimony and on the basis that Dummitt admitted in his pretrial affidavit, made months before the hearing, that he did tell Mealy in effect that as long as she insisted on going through with the Board charge he could not intervene, I find and conclude, upon my observation of the witnesses, that Mealy's version is the more accurate of the two and that Dummitt in effect told Mealy he could not process the grievance unless she dropped the charge against the Employer.[4]

In any event, Dummitt did evidently go to the office of the Respondent's counsel after leaving Mealy's home.

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[4] In coming to the foregoing conclusion, I have considered Dummitt's statement on the record, when faced with his pretrial affidavit, that the portion of the affidavit above quoted was a mistake which he had not noticed when he read and signed the affidavit. I do not credit the statement to the effect that Dummitt had not noticed a mistake in his pretrial affidavit.

There he discussed the matter with counsel. Dummitt testified that he was told by counsel that the Employer probably would not sit down to arbitrate the matter as long as the charge was pending.

A day or so later, according to Dummitt, June 27, he made contact with Mealy on the telephone at Mealy's new place of employment.[5] In the telephone conversation, according to Mealy, Dummitt asked her, again in her own words, "if I would drop the labor charges he would process the grievance." According to Mealy she refused to drop the charges and that was the full context of the conversation. Mealy has not heard from Dummitt since. Nor has she heard from anyone else connected with the Respondent.

According to Dummitt, he told Mealy that by reason of the fact that Mealy had a charge pending at the Board, they did not feel "that the Company would sit down and talk to us on the same charge with the charge before the Board." Then Dummitt testified "I told her that it would be up to her as to which way she wanted the Union to go." According to Dummitt, Mealy then said that she would let Dummitt know. Dummitt has at no time since then heard from Mealy.

On cross-examination Dummitt was asked the following question: "As a matter of fact, isn't it true that you told her," "It is up to you, if you want to drop the charges with the N.L.R.B. we will intervene?" Dummitt answered, "yes."

Inasmuch as the Mealy version of the conversation at Mealy's home has already been credited I find and conclude that Mealy's version of the telephone conversation at her place of employment is also the more accurate of

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[5] Mealy testified that Dummitt called her a week or two later. However, in this respect I believe Dummitt's testimony is more accurate. In any event, the date of the telephone call is not critical.

the two versions and I conclude that what Dummitt stated to Mealy was in effect a restatement of his original position that the Respondent would process Mealy's grievance if and when Mealy would drop the charges against the Employer.

The Respondent contends that regardless of the content of the two conversations between Mealy and Dummitt, it nevertheless processed the grievance. According to Dummitt's uncontroverted testimony, he was leaving town and telephoned Karl Williams, at that time president of the Drivers Local of the Respondent. Dummitt asked Williams to process the grievance. Since he could not physically hand the written grievance over to Williams, he read it to Williams. The grievance read as follows:

> On Friday, June 20, 1969, I was unjustly discharged by the Company, Guy's Foods, Inc. I deny the Company's accusations made in their letter of June 18, 1969.[6] I am hereby requesting my reinstatement to my former position with full seniority and all benefits and all lost wages be made whole to me.
>
> .....
>
> /s/ Helen Mealy

Williams' uncontroverted testimony relates that he did not write down the grievance but that on Friday, June 27, he contacted Guy Caldwell, president of the Employer and made an appointment with him. He later went to the Employer's establishment and spoke to Caldwell in person for about 30 to 45 minutes. The reasons for Mealy's discharge were discussed. Caldwell said that Mealy had been warned on a number of occasions for letting nuts and candy run out on the floor; she refused

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[6] This letter set forth the grounds upon which the Respondent discharged Mealy.

to shut off her machine when the paper ran out although she was ordered to do so by her floorlady. Caldwell said he would be glad to meet and talk over the matter with anyone from the Union but would not put Mealy back to work.

After this conversation, Williams reported back to Dummitt, told the latter of the conversation with Caldwell, and recommended to Dummitt that the grievance had been properly processed and that Caldwell would not rehire Mealy. There is no showing in the record that other than speaking to Caldwell and stating to him the purpose of his visit, Williams did anything in addition to investigate the charges or to in any way suggest alternative methods for dealing with the Mealy matter. Thus, he did not suggest that Mealy be only suspended as a disciplinary measure. Of course, it should be noted, that since Williams did not have physical possession of the grievance he did not present it as written to Caldwell.

The grievance procedure set forth in the bargaining agreement between the Employer and the Respondent requires that the first grievance step was to be made by the individual concerned to the supervisor. If nothing results therefrom, the second step of the grievance procedure is to be taken. This requires that within 7 days of the event, the Respondent present to the Employer a written grievance. It is undisputed that technically the grievance was not presented according to the contract because Williams did not present a written grievance to Caldwell. Williams admitted that he did not write down the grievance as it was read to him over the telephone by Dummitt.

Cladwell also testified and confirmed that to which Williams testified. I therefore find and conclude that the Respondent, through Williams, did at least grieve to the extent that he talked to Caldwell about the discharge of Mealy.

It should be noted, in passing, that the grievance procedure of the collective bargaining agreement between the Respondent and the Employer provides for a third step which may be used to further a grievance. This step provides for arbitration and, furthermore, provides that arbitration may be resorted to if the matter is not settled within 5 days after the grievance is presented in writing. The record is barren of any indication, nor does the Respondent contend, that the Respondent made any effort to proceed with the third step of the grievance procedure.

C. *Concluding Findings*

The Respondent argues that (a) Dummitt did not tell Mealy that the Respondent would not process Mealy's grievance against the employer unless Mealy withdrew the charges she had filed against the employer, (b) that in any event Respondent did process Mealy's grievance and that therefore committed no violation of the Act and (c) that the record is barren of any evidence that part of the reason for Respondent's refusal, if indeed there was a refusal, was Mealy's activity on behalf of the ABC.

With regard to argument (a), I have already found and concluded that on two separate occasions, first at Mealy's home and then during the telephone call to Mealy's place of employment, Dummitt, in so many words, told Mealy that Respondent would not process Mealy's grievance unless Mealy withdrew the charges against the Employer. Counsel for the General Counsel and the Charging Party both contend that this verbal refusal is sufficient restraint and coercion to constitute a violation of Section 8(b)(1)(A) of the Act. I agree.

Assuming, *arguendo,* that the Respondent did, after the verbal refusal to process Mealy's grievance, nevertheless properly process the grievance, there would still be a violation in the initial verbal refusal. It is well established that a Union may not resort to restraint or coercion

in any form for the purpose of restricting the right of an employee member to file charges with the Board.[7] And the Board has the affirmative duty to protect to the outermost limits of the Board's authority the right of employees to file charges.[8]

Since an employee, whether right or wrong, has the right to file charges and to be protected by the Board in doing so, it follows that the Board will protect an employee such as Mealy, who filed charges, from even a bare threat not to process a grievance unless the filed charge against the former employer is withdrawn. This is so because such a threat will naturally not only inhibit the employee who has resorted to the Act's protection but will interdict as well other employees who may learn of the Union's conduct in making the threat.[9]

By reason of the foregoing, it becomes unnecessary to determine whether the Respondent still refuses to process Mealy's grievance, or put another way, whether Respondent has, in fact, failed to properly process the grievance. The Respondent's argument, that in any event, the grievance was processed, and that, therefore, there is no violation is of no avail. Section 8(b)(1)(A) of the Act was violated when Dummitt told Mealy that Respondent would not process the grievance unless Mealy withdrew her charges against the Employer. In any event, the

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[7] *N.L.R.B.* v. *Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418, 424-425; *Local 138 International Union of Operating Engineers, AFL-CIO (Charles S. Skura)*, 148 NLRB 679, 681-682; *Amalgamated Meat Cutters and Butcher Workmen of North America, etc. (National Tea Company)*, 181 NLRB No. 116 at pp. 5-7 of the Trial Examiner's Decision.

[8] *Local 138, International Union of Operating Engineers, AFL-CIO (Charles S. Skura), supra*, at p. 681.

[9] Cf. *Selwyn Shoe Manufacturing Corporation, et al.*, 172 NLRB No. 81 at pp. 8-9 of the Trial Examiner's Decision.

collective bargaining agreement between the Respondent and the Employer would prevent the processing of the grievance at this time, because, as noted above, it provides that the second stage must be processed within 7 days after the grievance has arisen and the third stage of the grievance procedure provides that if the matter is not settled in the second stage within 5 days after presentation of the second stage, the grievance must be submitted to arbitration within 4 days thereafter, and *that time is of the essence.* Accordingly, even assuming the Respondent still has refused to process the grievance, there is no way, at this late date, to remedy this refusal by processing the grievance.

There remains for disposition the issue of whether the refusal of the Respondent to process Mealy's grievance was also motivated by reason of Mealy's sympathy with or activities on behalf of the ABC. The only evidence that the Respondent was aware, or had knowledge of, Mealy's sympathies for the ABC is the testimony of Mealy to the effect that some years before her discharge, at a Board conducted election, Mealy acted as an observer for the ABC. The record establishes that although Mealy's grievance was drafted by a business representative of the ABC and that possibly the business manager of ABC was the one who put through the telephone call from Mealy to Dummitt to apprise Dummitt of her grievance, there is no showing that Dummitt or anyone connected with the Respondent had knowledge of this. Additionally, since the time that Mealy acted as an observer for the ABC at the Board conducted election, Mealy served as a member of a bargaining committee of the Respondent in 1968 and at the time of her discharge was shop steward for the Respondent. Accordingly, I find and conclude that counsel for the General Counsel has failed to establish by a preponderance of the credible evidence that the Respondent had knowledge of any recent activity of Mealy on behalf of the ABC. Therefore, it can-

not be inferred that the Respondent refused to process Mealy's grievance because of her activities on behalf of the ABC. Accordingly, I shall order dismissed that portion of the complaint which alleges that the Respondent refused to process Mealy's grievance because of her activities on behalf of the ABC.

Conclusions of Law

1. Guy's Foods, Inc. is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Association of Packers & Drivers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By informing Helen Mealy that it would not process her grievance against Guy's Foods, Inc., unless she withdrew her unfair labor practice charge against Guy's Foods, Inc., the Respondent has engaged in, and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV. The Remedy

Having found that the Respondent engaged in certain unfair labor practices, it will be recommended that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10(c) of the Act, it is ordered that As-

sociation of Packers & Drivers Union, its officers, representatives, agents and successors and assigns shall:

1. Cease and desist from:

(a) Denying Helen Mealy, or any other employee similarly situated, fair representation in the processing and handling of her grievances filed pursuant to the Respondent's collective bargaining agreement with Guy's Foods, Inc., by telling or informing Helen Mealy or any other employee that the Respondent will not process any grievance unless the employee withdraw any charges the employee may have filed against Guy's Foods, Inc.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed in Section 8(b)(1)(A) and Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its business office, hiring halls, and meeting places copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in con-

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[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

spicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 17 signed copies of the attached notice for posting by Guy's Foods, Inc., at its various installations, if the said Company is willing to do so.

(c) Notify the Regional Director for Region 17, in writing, within 20 days from the receipt of this decision, what steps have been taken to comply herewith.[11]

It is further ordered that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of Section 8(b)(1)(A) of the Act other than those found herein.

Dated at Washington, D. C.

/s/ MORTON D. FRIEDMAN
Morton D. Friedman
Trial Examiner

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[11] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order as to what steps the Respondent has taken to comply herewith."

TXD-390-70

APPENDIX

NOTICE
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES
GOVERNMENT

Notice to all members of ASSOCIATION OF PACKERS & DRIVERS UNION.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT deny Helen Mealy or any employee similarly situated fair representation in the processing and handling of her grievance filed pursuant to the terms of our agreement with GUY'S FOODS, INC., by informing Helen Mealy, or any other employee, that we will not process any grievance unless charges against GUY'S FOODS, INC., are withdrawn.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

ASSOCIATION OF PACKERS & DRIVERS UNION
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 610 Federal Building, 601 E. 12th Street, Kansas City, Missouri 64106 (Tel. No. (816) 374-5181).